IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 273.

THOMAS W. MILLER, as Alien Property Custodian and FRANK WHITE, as Treasurer of the United States of America,

Appellants,

vs.

FREDERICK Y. ROBERTSON,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF ON BEHALF OF FREDERICK Y. ROBERTSON, AS APPELLEE.

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By leave of the Court we respectfully submit the following reply brief:

FIRST.

The rule that this Court, on all questions in this case, other than that of jurisdiction, will examine the record only to see if plain error has been committed, is applicable even though this case involves an appeal and not a writ of error.

In their Reply Brief appellants discuss certain questions other than that of jurisdiction, as deter-

mined by the meaning of the word "debt." As to those questions we contend (Pl. Br., pp. 82-84, 138) that, in view of the concurring opinion of the trial Court and of the Circuit Court of Appeals respecting them, this Court will affirm the decree, unless from an examination of the record it is apparent that plain error has been committed (Pl. Br., pp. 82-85, 138). Appellants assert (Appl. Rep. Br., pp. 24 and 25) that the rule is inapplicable because this is an appeal in equity and not a writ of error. This Court, however, recognizes no such distinction. Thus, on an *appeal* from the Circuit Court of Appeals for the Ninth Circuit, in *Washington Securities Co.* v. *United States*, 234 U. S. 76, the Court by Mr. Justice Van Devanter said (p. 78):

> "The rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this Court unless shown to be clearly erroneous. *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Towson* v. *Moore*, 173 U. S. 17, 24; *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20, 23; *Texas & Pacific Railway Co.* v. *Railroad Commission of Louisiana*, 232 U. S. 238."

Each of the four cases cited in the *Washington Securities Co.* case, we may add, involved an appeal.

Similarly, on an *appeal* from the Circuit Court of Appeals for the Eighth Circuit in the case of *Brewer Oil Co.* v. *Gas Co.*, 260 U. S. 77, the Court in an opinion by the Chief Justice said (p. 86):

> "Neither the argument nor the record discloses any ground which can overcome the weight which the findings of two Courts must have with us."

One of the cases cited as authority by the Chief Justice for the foregoing statement is *Chicago Junction R. Co.* v. *King*, 222 U. S. 222, which appellants claim (App. Rep. Br., p. 24) is not in point because it involved a writ of error.

SECOND.

The interpretation of the word "debt" in Section 9 of the Trading with the Enemy Act.

Appellants do not dispute a number of the propositions of law for which we contend in our brief, but they believe "that a comparatively short reply is advisable, in which we will seek to bring into sharp relief the operating facts and disputed questions of law" (App. Rep. Br., pp. 1, 2). They have not, however, attempted to meet our contention that Section 9 of the Trading with the Enemy Act is remedial and that it should, therefore, be liberally construed in order to carry out the manifest purpose of Congress.

In this connection, we again call attention to the significance of the action of Congress in repeatedly extending the period within which suits may be brought under Section 9, first extending it from six to eighteen months, then to thirty months, and finally removing it altogether (Pl. Br., p. 77). Nothing, we submit, could more pointedly indicate that Congress regarded the provisions of Section 9 to be remedial in character.

Briefly speaking, the argument of appellants

against a liberal construction of the word "debt" may be summarized as follows:

1. An injustice would result to the alien enemies, who would not be able to suitably defend actions brought against their property.

2. Certain classes of claims against enemy property would still be excluded from the benefits of the Act.

3. The common law action of debt did not include an action for damages for breach of an executory contract.

I. The claim that an injustice would be done alien enemies by adopting a liberal definition of the word "debt" is entirely without foundation. It is not disputed that suit can be brought under the Act to establish any interest, right or title in and to any enemy property held by the Alien Property Custodian. Appellants concede (App. Rep. Br., p. 11) that suits can be brought against the Alien Property Custodian under the common law definition of the word "debt" upon a *quantum meruit* or *quantum valebat*. It can hardly be claimed that such suits are mere matters of form or of such a perfunctory nature that no evidence need be introduced in their defense. It is apparent that no more of an injustice would be done alien enemies by subjecting their property to suits upon claims for which it is admittedly liable, than would be done them by subjecting it to a suit for a claim for damages for breach of a commercial contract. It can easily be conceived that disputed facts in suits relating

to bonds or stocks or title to real property would not be confined as appellants intimate (App. Rep. Br., p. 15) to the mere question whether or not the deed, bonds or stocks were genuine, but might readily involve complicated facts regarding the extent or kind of the interest claimed in the stocks or bonds or in the real property, any of which might well require elaborate trials necessitating the presentation of extensive evidence. Yet, it is conceded that Congress has intended that complicated questions of title and controverted questions as to the value of services rendered, or as to goods sold and delivered, may be determined in suits brought under Section 9 on claims involving such questions.

In our Opening Brief (pp. 76, 80) we discussed the conclusion of the Circuit Court of Appeals, that "it was not the intention of Congress to place the duty upon the courts of determining the fact of liability without at the same time imposing the duty of finding the extent thereof," and to that discussion we respectfully refer.

It cannot be assumed that a court of equity would permit an injustice to be done alien enemies in the prosecution of a suit against them, such as the case at bar, without affording the enemy defendants as full an opportunity to present their defense as it would afford them in a case which admittedly may be brought under Section 9 to establish any other debt, or interest, or title in any property of the alien enemy held by the Custodian.

As a matter of fact, this fear of appellants is entirely unfounded. This Court laid down the

rule in the case of *Watts, Watts & Co.* v. *Unione, etc., Co.,* 248 U. S. 9, that where an action was brought against an alien enemy prior to the termination of the war, it would require an adjournment of the trial until such time as it was possible for communication to be had with the alien enemy, so that it could "present its defense adequately." In the case at bar, the record shows that not only was an order made by the trial Court, requiring the alien enemies to be made parties to the suit (Rec., pp. 12-13), but also that a supplemental subpoena was issued and personal service of the same made on the alien defendants in Frankfort-on-the Main, Germany, through the State Department (Rec., p. 40). It further appears that the trial of this action was not begun until June 9, 1920 (Rec., p. 119), nearly a year after the War Board had lifted all restrictions with enemy countries, and that at the trial the representative of Beer, Sondheimer & Company testified as a witness for appellants.

The fact that, by the provisions of Section 9, the Alien Property Custodian or Treasurer of the United States must be made a party defendant in suits under the section, implies, of course, a full defense of the suit by such official in the proper discharge of his duty. The rule that official duty will be presumed to have been properly performed, is, of course, elementary. The soundness of this rule is well illustrated by the very defense of this action. As counsel for appellants stated at the oral argument, the action was defended by the Alien Property Custodian and the Treasurer through their own attorneys. The merest glance at the record and a

consideration of the successive appeals will show how full, thorough and complete that defense was.

The argument of appellants, that this Court should so construe Section 9 as to prevent a theoretical injustice to alien enemies, necessarily implies that the Court should give the statute such a narrow construction as to work an actual injustice to American citizens. This readily appears when it is remembered that the property of the alien enemies out of which the plaintiff could have satisfied his claim, has been seized by the Custodian and by the statute has been placed beyond the reach of ordinary judicial process (Pl. Br., p. 78).

Finally, appellants blandly suggest (App. Rep. Br., p. 24) that,

> "now, that the former enemies are free to come here and prosecute or defend any actions that they may see fit,"

it may be assumed that Congress did not intend to afford relief for claims such as that of plaintiff. The irony of this suggestion becomes peculiarly apparent, when it is remembered that the first suit which was brought on the contract under consideration, in the State of Utah in June, 1916, was dismissed for want of jurisdiction and that the next suit which was brought immediately thereafter in the State of New York in September, 1916, was dismissed for the same reason, after a false affidavit by the representative of Beer, Sondheimer & Company that they and not the German partners were the owners of the stock in the corporation to which

the partnership property had been transferred, and which stock plaintiff had attached in order to get constructive service on the defendants (Pl. Br., p. 177).

2. That a liberal construction of the word "debt" would not remedy the "injustice" in the case of tort claimants is, we submit, manifestly no valid argument for extending this "injustice" to claimants for breaches of commercial contracts. In the first place, it is no valid argument in favor of a narrow interpretation of the word "debt", that a liberal interpretation of that word does not include claims for torts.

Appellants point out that under some of the state statutes a tort claimant against Beer, Sondheimer & Company could have attached their property prior to its seizure by the Alien Property Custodian. Having established this premise, they seem to urge one of two conclusions; either that a broad interpretation of the word "debt" must include tort claims, a proposition for which we have never contended, or that the exclusion of tort claims would be as great an "injustice" to such claimants, as the exclusion of claims for damages for breach of a commercial contract would be to the plaintiff. Their theory seems to be that, if Congress is to be held to have been "unjust" to tort claimants, this Court should also deprive the plaintiff of his remedy under the Act, in order to secure as even-handed a distribution of *"injustice"* as possible under the wording of the Act. We submit, however, that two "injustices" do not make "justice" and that the word "debt" should not be held to be too narrow to include a claim for damages for

breach of a commercial contract, simply because it is not broad enough to include a claim for a tort.

In the second place, there is a natural distinction between claims for damages for tort and claims for damages for breach of contract, which has always been recognized. Contracting parties, as a matter of fact, deal with each other upon the faith of their mutual financial responsibility, as evidenced by their property holdings (Pl. Br., pp. 78-82). A tort claimant, however, does not incur his claim upon the faith of property owned by the person who committed the tort against him.

3. Appellants seek to make it appear that the action of debt at common law was confined to cases in which a *quid pro quo* had passed from the plaintiff to the defendant. There was, however, no such limitation.

This Court said in *Stockwell* v. *United States*, 13 Wall. 531, 542:

> "Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, *if the sum owing is capable of being definitely ascertained.*" (Italics ours.)

This definition is followed and adopted in *United States* v. *Chamberlain*, 219 U. S. 250, 263.

We submit (Pl. Br., pp. 42-48) that the plain-

tiff's claim is one "capable of being definitely ascertained," as the Circuit Court of Appeals correctly held.

Appellants have placed great reliance on the case of *W. S. Tyler Co.* v. *Deutsche, etc.*, 276 Fed. 134, and have quoted from its language at much length.

In its final analysis, however, the opinion in the *Tyler* case, we submit, must be considered as holding that the action could not be brought under Section 9 of the Trading with the Enemy Act, either because it sounded in tort arising out of the conversion of the cargo by the steamship company, or because a claim for the reasonable value of goods is not a debt. But, we do not contend and we never have contended that a claim for damages for tort is a debt, and if the *Tyler* case is to be considered as having been decided on the theory that plaintiff's claim against the steamship company was for a tort, because of the conversion of the cargo and, therefore, not a debt under Section 9 of the Trading with the Enemy Act, then we have no quarrel with it. If, on the other hand that case is to be considered as holding that a claim for the reasonable value of goods is not a debt and that, therefore, the action did not lie under Section 9, then we submit for the reasons stated in our Opening Brief, pages 62-79, it is manifestly wrong. Indeed, the appellants themselves say (App. Rep. Br., p. 11):

> "We do not dispute the common law has been extended so that debt may lie

upon a *quantum meruit* or *quantum valebat,* a proposition set forth on pages 57 to 58 of appellee's brief."

This, however, is not the only important principle in which appellants unwittingly repudiate the *Tyler* case. In that case the Court said that it is of the essence of a debt that its amount must be fixed without the intervention of a jury. Its precise language in this behalf is as follows (276 Fed. 137, 138):

> "It is, however, of the essence of a debt that the amount is fixed or may be definitely ascertained independently of extraneous circumstances and without the intervention of a jury."

In direct opposition to the rule so declared, is the following statement by appellants (App. Rep. Br., p. 11):

> "Our contention is not that the calling of a jury to decide how much was owing to plaintiff deprives, *ipso facto,* the claim of its character of a debt."

In addition to the cases cited in our brief, we call the attention of the Court to two opinions of Attorneys General and to certain statutes of the United States which, we think, strongly support the position that the word "debt" in Section 9 of the Trading With the Enemy Act includes a claim for damages for breach of a commercial contract.

In an *opinion dated May 17, 1845, Attorney General J. Y. Mason* held that, where the same person is a contractor with the government for two articles under separate contracts and fulfills one and fails in the other, the claim of the govern-

ment for damages by reason of such failure is a debt and that the accounting officer in settling the account may set off in the adjustment the debt due from the contractor to the government for the breach of contract. The Attorney General said (4 Ops. Atty. Gen. 380):

> "It is the right of every creditor to withhold payment to the extent of a debt due to himself. It makes no difference on what grounds the relation of debtor and creditor arises. If, therefore, by the execution of one contract the government becomes indebted to a contractor, and, by reason of failure to execute another, the same contractor becomes indebted to the government for the excess of price paid for the contract article over the contract price, such indebtedness ought to be discharged before payment is made, and may be set off against the money due."

Similarly, in an *opinion dated February 17, 1847, Attorney General Clifford* (afterwards Justice Clifford of this court) ruled that the government could set off against the value of tea furnished by a contractor the damages which it had sustained by reason of the contractor's breach of an agreement to furnish sugar (4 Ops. Atty. Gen. 551, 554).

The rule declared in these opinions was enacted into statutory law by the *Act of March 3, 1875* (18 stats. 481). That act provides that, where a judgment or other claim duly allowed by legal authority is placed with the Secretary of the Treasury for payment,

> "and the plaintiff or claimant therein shall be *indebted* to the United States in any

> manner, whether as principal or surety, it shall be the duty of the secretary to withhold payment of an amount of such judgment or claim equal to the *debt* thus due to the United States * * *."

The act further provides for legal proceedings by the United States to enforce the *debt* in case the plaintiff refuses to consent to the set off.

That a claim for damages for breach of contract creates a debt under this statute in favor of the government was taken for granted by the Circuit Court for the District of New Jersey in the case of *United States* v. *Ennis, et al.*, 132 Fed. 133.

Section 2296 of the Revised Statutes provides that no land acquired under the provisions of the Homestead Act of 1862

> "shall in any event become liable to the satisfaction of any *debt* contracted prior to the issuing of the patent therefor."

This Court has held that the purpose of this enactment is to protect the homesteader in the establishment of a home (*Ruddy* v. *Rossi*, 248 U. S. 104; *Anderson* v. *Carkins*, 135 U. S. 483, 489). Manifestly, we submit, the class of debts, therefore, against which the homesteader is thus protected includes a claim for damages for breach of a commercial contract. In the case of *State* v. *O'Neil*, 7 Ore. 141, the Supreme Court of Oregon held that the words "any debt" in the statute include any liability. The Court said (p. 142):

> "Section 2296 of the Revised Statutes of the United States provides that 'No lands acquired under the provisions of this chap-

> ter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.'
>
> The words 'debts contracted' do not necessarily mean debts or obligations incurred by an agreement of parties. The word contract has a more extensive signification than to make an agreement. Debts contracted in the ordinary acceptation of the term will include liabilities incurred. If, for a trespass committed by a homestead claimant, a judgment for damages should be recovered against him before the issuing of a patent for the land, we hold that the homestead could not lawfully be sold on an execution issued upon the judgment after the date of the patent. The object congress had in view, by the enactment of that law, was to secure permanent homes to settlers on the public domain, and in no event to allow them to be sold upon execution to discharge any liability incurred by the homestead claimants before the patent should issue."

Section 1237 of the Revised Statutes provides, in substance, that no enlisted man shall be arrested on *mesne* process or charged in execution "for any debt." *Section 1610* contains a provision to the same effect with regard to marines. Clearly, we submit, it could not reasonably be contended that a soldier or marine, though not subject to arrest upon a promissory note or similar obligation, could, nevertheless, be arrested and imprisoned upon a claim for damages for breach of a contract.

Section 4537 of the Revised Statutes provides that no sum exceeding one dollar is recoverable

from a seaman "for any *debt* contracted during the time such seaman shall actually belong to any vessel" until the voyage is ended. The word "debt" as here used, we submit, manifestly is not restricted to "sums due by certain and express agreement."

The foregoing statutory provisions show the consistent use by Congress of the word "debt" in a sense which we think plainly includes a claim for damages for breach of a commercial contract. They furnish, we submit, at least a strongly persuasive argument that Congress used that word in the same sense in Section 9 of the Trading With the Enemy Act.

THIRD.

There was no error with respect to the interest allowance.

In our opening Brief pages 172-183 we discussed the interest allowance. The only new suggestion advanced by appellants in their Reply Brief upon this subject is that in the case of *Banco Mexicano, etc.*, against *Deutsche Bank*, 44 Sup. Ct. Rep. 209, cited in our opening Brief page 80, this Court at the end of its opinion said:

> "this suit is in effect a suit against the United States and all of its conditions must obtain."

This statement, manifestly, was made only with reference to the question before the Court, namely, whether or not the facts as stated in the bill of complaint in that case were sufficient

to constitute a cause of action under Section 9. The plaintiffs were friendly aliens seeking to enforce in a suit under Section 9 a debt against the Deutsche Bank out of property in the hands of the Alien Property Custodian. It was held that, inasmuch as the bill of complaint on its face showed that the debt in question did not arise,

> "* * * with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States,"

as is necessary under the amendment of June 5th, 1920 (41 Stat. 977), to Section 9, in the case of claimants other than citizens of the United States, the bill of complaint had been properly dismissed. Obviously, the question related only to the sufficiency of the facts as stated in the bill of complaint and as to them the Court held that there must, under the circumstances, be a strict compliance with the requirements of the statute. There is nothing, we submit, in the foregoing language of the Court from the *Banco* case, or in the Trading with the Enemy Act which makes against the application of the usual and ordinary rules, based upon the doing of substantial justice between the parties (App. Br., pp. 176-178), regarding the allowance of interest. On the contrary, the very fact that Congress directed suits under Section 9 to be brought *in equity* in the District Courts rather than in the Court of Claims, we contend, is evidence of the manifest intention on its part that such suits should not be subject to the limitation, with reference to the allowance of interest,

imposed by Congress on suits brought in the Court of Claims (Judicial Code, Sec. 177, *Rice* v. *U. S.*, 122 U. S., 611, 619, 620; Pl. Br., p. 181). The significance of this designation of the tribunals in which suits under Section 9 are to be brought becomes all the more apparent, when it is remembered that in the Captured and Abandoned Property Act of 1863 (12 Stat. 820), Congress directed suits to be brought in the Court of Claims (12 Stat. 820, Sec. 3).

In our Opening Brief, page 182, we called attention to the fact that this Court has decided that in suits against the Director General of Railroads damages may include interest and costs. Such suits this Court also held are suits against the United States (*Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 564). There is, however, no provision in the Federal Control Act (40 Stat. 451), under which such suits are brought, for interest or costs; but, this Court has decided that a successful litigant under that Act is entitled to them, just as we submit he should be entitled to them in an action under Section 9 of the Trading with the Enemy Act.

Should the Court, however, hold that this is so strictly a suit against the United States that plaintiff is not entitled to interest, then we submit that the running of interest should at most be tolled from July 12, 1918, the date on which the Alien Property Custodian seized the property of Beer, Sondheimer & Co. (Rec., p. 667), to July 5, 1921, the date of the final decree, in this suit (Rec., p. 101). If plaintiff's claim is to be treated strictly as a claim against the United States, then we submit it must obviously be

measured by the extent of his claim against Beer, Sondheimer & Company at the time of the seizure of their property by the Alien Property Custodian, and that his claim so measured certainly included interest up to that date.

FOURTH.

The question of lack of mutuality was not open in the courts below and is not open on this appeal.

In answer to our contention that the defense of lack of mutuality is not open on this appeal, because Beer, Sondheimer & Company gave definite reasons for their refusal to accept the ore, without suggesting in any way that the contract lacked mutuality (Pl. Br., 86-91) Appellants say (App. Rep. Br., p. 26):

> "When the case reached the Circuit Court of Appeals, the present appellee for the first time made the contention that this defense was not available to the present appellants."

Appellants made practically the same statement in a Reply Brief which they filed in the Circuit Court of Appeals (App. Rep. Br., C. C. A., pp. 13-17). In a reply to that brief (Pl. Rep. Br., C. C. A., pp. 7-8) we pointed out that at the conclusion of the trial, Judge Hand directed the parties to file briefs (Rec., p. 206); that in the "Memorandum on Behalf of Plaintiff", filed pursuant to this order, plaintiff

devoted five pages to the point, as stated under heading VI of his memorandum that

"VI

> "(B) Beer, Sondheimer & Co., having alleged as a reason for their refusal to receive further shipments of ore that they were prevented from so doing by abnormal conditions, amounting to *vis major,* cannot now set up want of mutuality as a ground for avoiding their liability under the contract."

In the memorandum reference was made to *Goodman* v. *Purnell,* 187 Fed. 90; *Ohio, etc., R. Co.* v. *McCarthy,* 96 U. S. 258, and to other cases cited to the same point in Plaintiff's Brief in this Court (Pl. Br., pp. 89-91).

Why appellants, after having had their attention directed to the facts in this regard, should persist in the foregoing statement, we cannot understand.

In this connection, appellants again refer to Beer, Sondheimer & Co.'s letter of April 6th, 1915 (App. Rep. Br., 27-28). We have discussed this letter briefly on pages 88, 151-152 of our Opening Brief. In view of appellant's renewed reference to it, we may add that that letter was written during the course of abortive compromise proceedings which had been begun some weeks after the contract had been broken by Beer, Sondheimer & Company's telegrams of March 17th, 23rd and 24th, 1915 (Pl. Exhs. 53, 54 and 55, Rec., pp. 465, 466). These telegrams were offered in evidence by plaintiff to prove the breach of the contract (Rec., p. 125). It was

stipulated in open Court that, after those telegrams had been sent, Beer, Sondheimer & Company accepted no more ore under the contract. We quote from the record (Rec., p. 126):

> "Mr. Sutro: I presume it will be stipulated, Mr. Jerome, that after the sending of the telegrams in March, 1915, Beer, Sondheimer & Company did not accept any more ore under the contract.
>
> Mr. Jerome: I believe that to be a fact."

In other words, the contractual relations between the parties had been broken off by the March telegrams and the record shows without contradiction that the conversation referred to in the letter of April 6th, 1915, was a part of compromise negotiations whereby Beer, Sondheimer & Company sought a new contract with the Mammouth Company containing terms more favorable to them than the contract in suit. The witness Jennings testified that he was present at the conversation with Lyon, representing the Mammoth Company, and Elkan, representing Beer, Sondheimer & Company, had in New York on April 5th, 1915, and which is referred to in the letter of April 6th, 1915. He testified that the conversation was had for the purpose of trying to come to an amicable adjustment of the dispute between Beer, Sondheimer & Company and the Mammoth Company; that in that conversation "Mr. Elkan said that the terms" (of the contract) "owing to the extreme rise in the price of zinc, and the probability that there would be a fall, were burdensome and dangerous, unlikely to be profitable," and that "he desired a modification

of it" (Rec., p. 188). In this connection, Salinger's telegram of February 23rd, 1915 (Pl. Exh. 4, Rec., p. 458), pleading for a modification of the contract, is pertinent as likewise is the testimony of the witness Lyon that Elkan "wanted a modification of the terms of the contract" and that "he thought that the terms should be improved, that they should get better smelting charges" (Rec., pp. 185-186).

Appellants say concerning the letter of April 6, 1915 (App. Rep. Br., pp. 27-28):

> "It shows that Beer, Sondheimer Co. at that early date, objected to the contract, because, as they stated, the representative of the Mammoth Company, Mr. Lyon, had taken the position that the latter was entirely free to refrain altogether from shipping any ore, or to ship as much as it might desire."

The witness Lyon, however, denied absolutely that he had taken the position attributed to him in that letter, that the Mammoth Company could refrain altogether from shipping ore or ship as much as it desired (Rec., pp. 185-186). In this statement he was corroborated by the witness Jennings, who, as above stated, was present at the interview between Elkan and Lyon, at which Elkan claimed that Lyon had made these statements (Rec., pp. 187-188). The trial Court believed the witnesses Jennings and Lyon and did not believe Elkan.

FIFTH.

Concerning the merits of the controversy.

In Subdivisions (A), (B), (C) and (D), under the heading "Concerning the Merits of this Controversy," appellants reiterate their contentions that the contract lacked mutuality, that the Mammoth Company was guilty of prior breach of the contract, that the contract in suit is against public policy, and that there was no actual resale loss (App. Rep. Br., pp. 28-39). Besides this reiteration of their contentions, appellants make reference to and quote certain isolated parts of the evidence. This renewed discussion of these points well illustrates, we submit, the wisdom of the rule of this Court, the application of which we have invoked, that as to questions of this kind the Court will only examine the record to see if plain error has been committed, and that in the absence of such error it will not disturb the findings of the Circuit Court of Appeals, especially if such findings affirm the findings of the trial Court. There is in this case it seems to us but one question with the consideration of which this Court should be burdened, namely, the meaning of the word "debt." All the other questions are of a nature, which under the policy of the Judiciary Act of 1891, are ordinarily relegated for their final determination to the Circuit Court of Appeals.

In the case of *Great Northern Railway Co.* v. *Knapp*, 240 U. S., 464, which involved a dispute

under the Federal Employers Liability Act, this Court said (p. 466):

> "Having regard to the appropriate exercise of the jurisdiction of this Court, we should not disturb the decision upon a question of this sort unless error is palpable. *The present case is not of this exceptional character* and we confine ourselves to an announcement of our conclusion." (Italics ours.)

The matters discussed by appellants under these subdivisions of their reply brief are, we think, fully covered in our opening brief, to which in this behalf we respectfully refer (Pl's. Br., pp. 91-172). If these matters are, however, to be further considered, then we call attention to the following erroneous inferences of fact, which appellants seek to draw from carefully selected portions of the record.

Appellants again state (App. Rep. Br., p. 2) that, when the contract in suit was entered into the Mammoth Company had no established zinc mine and that the zinc picking or sorting plant was not at the time completed; also that the contract contained the words "shipped * * * from." These matters are but repetitions of the contentions advanced in their Opening Brief (App. Br., pp. 55, 58-59) and ignore the facts which we have already fully discussed (Pl. Br., pp. 100-105) and which show that the contract is supported by adequate consideration moving from the Mammoth Company for any one of five separate and sufficient reasons (Pl. Br., pp. 91-135).

Appellants again refer to Metcalfe's telegrams sent before the contract, according to its terms, was in operation. In view of this repeated reference to these telegrams, we feel constrained to again call attention to the fact that the contract was not to be in operation or effective until some months after these telegrams had been sent. The contract provided under the heading "Period" (Rec., p. 66) that:

> *"This contract shall run for a period of one year from the date of first shipment made after the completion of the picking plant* which the seller contemplates building, but in no event shall the life of the contract exceed eighteen (18) months from the date of its execution."

The picking plant was completed March 5th, 1915 (Rec., p. 121), and the first shipment thereafter was on March 6, 1915 (Rec., p. 463). The telegrams in question had reference to shipments during the months of October, November and December, 1914—shipments which as we have shown (Pl. Br., pp. 118 to 123) were made as an accommodation to Beer, Sondheimer & Company and at an actual loss of more than $10,000 to the Mammoth Company.

The argument of appellants, that the picking plant was not completed at the time that the contract was executed, ignores the proposition that there may be a valid output contract, with reference to a new business or to a new department of an old business (Pl. Br., pp. 101-105).

Appellants also quote extracts from Metcalfe's testimony, giving in part his construction of the

contract based on hypothetical conditions which never existed and which were wholly contrary to the facts. Metcalfe's interpretation of the legal effect of the contract, as determined by such conditions, is, we submit, of no materiality. If, however, it is to be considered, then all of it should be quoted. Appellants omit from the very middle of the part which they quote, the following statement (Rec., p. 159):

> "A. Our construction of the contract was that what we were really selling, and what Beer, Sondheimer & Company were definitely buying, was the product of this new picking plant, but that to oblige them we would get out anything that we could prior to that time."

Appellants contend that the decree of the Circuit Court of Appeals cannot be affirmed without disregarding the particulars from the record to which they refer (App. Rep. Br., p. 5). No one of these particulars, however, we submit, is material and there is no reason why the Court should not disregard them. The Circuit Court of Appeals said (Rec., p. 665):

> "We find on this record that the Mammoth Company carried out its promises under the terms of the contract."

The fact that the Mammoth Company performed the contract is, we submit, the important consideration and not what Metcalfe said he might have done under conditions that never existed. Metcalfe's testimony was given in reply to the examination by astute counsel which

called for Metcalfe's construction of the contract. This testimony was obviously immaterial and incompetent and as the trial Court properly suggested (Rec., p. 159) was "nothing but an argument, anyway." There cannot be the slightest doubt that, if for any reason the Mammoth Company had not performed the contract and Beer, Sondheimer & Company had brought a suit for its breach, they would not have felt themselves bound under any circumstances by Metcalfe's construction of it. It is obvious that the true interpretation and meaning of the contract is what controls and not what either party might have thought it meant when tested by hypothetical conditions. As the trial Court in this connection pertinently stated (Rec., p. 60):

> "The Mammoth Company was about to construct a picking plant with which to separate its ore. It was plainly contemplated by the parties that, when this plant was installed, ore should be produced and shipped from it. It was completed in March, and the Mining Company began to increase its output accordingly. *This fact, rather than Metcalfe's theories as to his legal obligations, is important.*"

CONCLUSION.

In conclusion, we respectfully submit, that this case, in its last analysis, is nothing more or less than another instance of a buyer seeking, on a falling market, to escape his just obligations under a contract. We earnestly submit that the result in the Court below is in strict accordance

with law, with the facts and with real and substantial justice, and that the decree, except as to freight, should be affirmed with costs.

Dated, May 6, 1924.

Respectfully submitted,

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